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Sec. 7 12

8 12

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1189

WILSON & CO., INC., A CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 1550–1554) is reported in 126 F. (2d) 114. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1508–1531) are reported in 31 N. L. R. B., No. 69.

JURISDICTION

The decree of the court below (R. 1564–1566) was entered on April 4, 1942. A petition for rehearing filed by petitioner (R. 1555) was denied on March 25, 1942 (R. 1556). The petition for a writ of certiorari was filed on April 28, 1942.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there was substantial evidence to support the Board's findings that petitioner dominated, interfered with, and supported successive labor organizations of its employees in violation of Section 8 (1) and (2) of the Act.

2. Whether, in the circumstances of this case, the Board's action in holding an election in proceedings under Section 9 of the Act barred it from prosecuting subsequent unfair labor practice charges under Section 10.

3. Whether the Board's cease and desist order is unduly broad in light of the Board's findings.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 12–14.

STATEMENT

After the filing of charges and amended charges in May and August 1940 by Local Union No. 25, United Packinghouse Workers of America of PWOC, affiliated with CIO, herein called the Union (R. 1435–1439), and after the issuance of a complaint by the Board on August 29, 1940 (R. 1439–1443), and after the other usual pro-

ceedings, the Board issued its findings of fact, conclusions of law, and order (R. 1508–1531). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[1]

From 1921 until December 1936, petitioner maintained an employees' representation plan called the Joint Representative Committee Plan (R. 1513–1516, 1523; 766–771). The Plan contained provisions for control by a committee composed of an equal number of employee and management representatives, thereby enabling petitioner to block any action of which it disapproved (R. 1514, 1515; 766, 769); the committee's "permanent impartial chairman" and "permanent impartial secretary" were appointed by petitioner (R. 1514, 1515; 769); the committee's function concerning wages, hours, and working conditions was limited to making "recommendations" (R. 1514; 766, 770–771). There was no provision for payment of dues, for general employee meetings, or for membership, and all employees of one month's standing were automatically entitled to vote for representatives (R. 1513, 1514–1515, 1520; 32, 222, 767). Petitioner bore all the expenses of the organization, furnished company facilities for operation of the Plan, and paid employee representatives for time

[1] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

spent on Plan business (R. 1513–1514, 1515; 24, 32, 252, 742, 743, 768, 769). Petitioner held an absolute veto power over amendments to the Plan (R. 1515–1516; 771).

In December 1936, the employee representatives under the Joint Representative Committee Plan substituted therefor a plan known as Wilson Employes' Representation Plan; petitioner's Manager of Industrial Relations assisted, and the management representatives under the old plan participated, in the transformation (R. 1517–1518, 1524; 223–224, 252, 691, 694–696, 773–779). The new Plan recited that it was "approved by the management" (R. 1518; 773). For a considerable period after its creation, the new Plan was administered by the old employee representatives who retained office without a new election (R. 1518, 1521, 1524; 37, 779). The new Plan was essentially like the old Plan; while there was no formal provision for management representatives on the governing committee, management representatives in fact continued to attend and to participate in the committee meetings, and they also edited its minutes (R. 1518, 1520, 1524–1525; 49, 59, 92–94, 808–872). As before, no provision was made for dues, for general employee meetings, or for membership, and all employees of petitioner automatically were entitled to vote for representatives (R. 1518, 1520, 1522; 40, 641, 773–779). Also as before, petitioner defrayed all expenses of the Plan, supplied company facilities for the

operation of the Plan, and paid employee representatives for time spent on Plan business and, on occasion, even when it knew that the representatives were merely pretending to be occupied with Plan business (R. 1518–1520, 1521–1523, 1525; 38–40, 44–45, 50, 60, 81, 225, 229–230, 253, 259, 260–261, 399–400, 402–404, 406–407, 409–410, 415, 637–640, 739–741). When the Plan retained an attorney, it chose one suggested by petitioner (R. 1522; 69, 230–231, 257, 453–455). The new Plan, like the old, granted petitioner full veto power over amendments to the Plan (R. 1520, 1522, 1525; 777).

The Board found and concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act (R. 1516, 1526, 1529–1530). In so holding, the Board rejected (R. 1510–1511) a defense offered by petitioner that the Board was precluded from proceeding with the instant case because on January 26, 1940, prior to the filing of the charges by the Union and the issuance of the complaint by the Board, the Board had conducted an election in a representation proceeding under Section 9 of the Act in which the Plan committee as well as the Union were permitted to appear upon the ballot and in which the Plan committee obtained a majority of the votes cast (R. 1033–1055). The election, however, did not result in certification of the Plan committee by the Board because in the

interim the Union had filed its charges of unfair labor practices (R. 1510).

The Board in its decision found not only that petitioner had violated Section 8 (1) and (2) of the Act but that the violations were of such duration and character as to disclose an underlying purpose to defeat self-organization and its objects and to indicate the probability that the interrelated guarantee of Section 7 would be violated in the future unless restrained (R. 1528–1529).

The Board's order required petitioner to cease and desist from its unfair labor practices and from in any manner infringing the rights guaranteed in Section 7; to disestablish and refuse recognition to the Plans and to the committees established thereunder; and to post appropriate notices (R. 1530–1531).

On May 6, 1941, petitioner filed in the court below a petition to review and set aside the Board's order (R. 1534–1542, 1548). The Board answered, requesting enforcement of the order (R. 1543–1547). On February 19, 1942, the court handed down its opinion enforcing the Board's order (R. 1550–1554). On March 25, 1942, a petition for rehearing filed by petitioner was denied (R. 1555–1556). A decree of enforcement was entered on April 4, 1942 (R. 1564–1566).

ARGUMENT

1. The evidence, summarized above (pp. 3–5), clearly warranted the Board's findings that the

company engaged in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act. Cf. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241. This evidence is plainly substantial and is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229. And whatever the language of the court below in the course of its observations concerning other cases, it appears that it found in this case not "some" but "substantial" evidence.[2]

2. Petitioner urges (Pet. 7–8, 3–5) that the Board's order should have been denied enforcement because the instant proceeding was instituted not "for the purpose of preventing and correcting alleged unfair labor practices" but "for the purpose of eliminating the labor organization which defeated the [Union]" in the Section 9 election conducted by the Board (see *supra*, p.

[2] With respect to the instant case, the Court declared that it was "fully convinced" that there was "evidence which sustains the finding that both local organizations had their origin and creation in petitioner's efforts; that both were somewhat dominated by petitioner and financed by it. Neither committee was an entirely free, uncontrolled agent, and neither was qualified to serve, adequately, the employees, as their collective bargaining agent" (R. 1553–1554).

5). It is apparently petitioner's position that because the Board allowed the Plan committee to participate in and appear on the ballot in the representation proceeding, it thereby adjudicated the validity of the Plan and the Board was thereafter barred from attacking the legality of the Plan in a subsequent unfair labor practice proceeding.

Petitioner's contention does not differ essentially from that urged in the petitions for certiorari in *Warehousemen's Union* v. *National Labor Relations Board,* and *McKesson & Robbins, Inc.* v. *National Labor Relations Board,* Nos. 627 and 628, this Term, certiorari denied, 314 U. S. 674. For the reasons stated in the Board's briefs in opposition in those cases, the contention is without merit. Petitioner's unfair labor practices clearly were not in issue in the representation proceeding. The purpose, procedure, issues, and effect of a representation case under Section 9 of the Act are wholly different from those of an unfair labor practice case under Section 10. The former involves only a fact-finding inquiry into the identity of representatives for subsequent collective bargaining; the latter seeks to remedy unfair labor practices if found to have been committed, and to prevent their repetition. *American Federation of Labor* v. *National Labor Relations Board,* 308 U. S. 401, 405, 409. There is nothing in the Act which prescribes the order in which proceedings under

Sections 9 and 10 of the Act, respectively, must be conducted, or which requires the Board to withhold an election in a representation case pending the possible filing of charges and issuance of a complaint in an unfair labor practice case involving the same employer. Until charges were filed the Board could not have issued a complaint (Section 10 (b); cf. *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 368–369); when, following the election, charges were filed, the Board acted within its clear statutory authority and discretion (Section 10 (a), (b), (c)) in issuing the complaint.[3]

3. Petitioner attacks (Pet. 6, 8) the provision of the order which restrains petitioner from in any manner infringing the rights guaranteed in Section 7 of the Act as invalid under the principles enunciated in *National Labor Relations Board* v. *Express Publishing Co.,* 312 U. S. 426. However, as appears from the Statement (*supra,* pp. 3–5), the Board's findings, supported by substantial evidence, reveal that petitioner dominated and interfered in a multitude of ways with the administration of its employees' labor organization for over two decades, and that when such interference became illegal in 1935, petitioner nevertheless con-

[3] *National Labor Relations Board* v. *Indiana & Michigan Electric Co.,* 124 F. (2d) 50 (C. C. A. 6), certiorari granted May 25, 1942, No. 1137, this term, and *Magnolia Petroleum Co.* v. *National Labor Relations Board,* 115 F. (2d) 1007 (C. C. A. 10) are plainly not in conflict. The former is not in point, while the latter supports the Board's position in this case.

tinued, and is still continuing, its illegal activities without substantial change. In the *Express* case, this Court recognized that "the breadth of the order * * * must depend upon the circumstances of each case" (312 U. S., at 436); and it pointed out (at pp. 433, 434–435) that the Board had made no finding upon the facts of that case as to any probable relationship between the unfair labor practices committed and other possible types of unfair labor practices. In the instant case, on the other hand, the Board, citing the *Express* case (R. 1529n), specifically found that the unfair labor practices which had been committed were "persuasively related to the other unfair labor practices proscribed and that danger of their commission in the future is to be anticipated from the course of the [petitioner's] conduct in the past" (R. 1529).

The making of such findings and the formulation of appropriate orders are entrusted by the Act to the expert judgment of the Board. Cf. *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 600; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194. The Board's judgment was properly exercised in the circumstances of this case. In any event petitioner's contention, insofar as it challenges the particular exercise of judgment, clearly presents no question of general importance. Provisions like

the one here in controversy were enforced in *National Labor Relations Board* v. *Automotive Maintenance Machinery Co.*, No. 188, this Term, decided February 16, 1942; *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, No. 588, this Term, decided March 30, 1942; and *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, No. 774, this Term, decided April 27, 1942. A contention similar to that raised by petitioner was raised by the employer in *Owens-Illinois Glass Co.* v. *National Labor Relations Board*, No. 985, this Term, certiorari denied April 6, 1942.

CONCLUSION

The decision below, sustaining the Board's findings and order, is correct and presents neither a conflict of decisions nor any question of general importance. The petition should, therefore, be denied.

Respectfully submitted.

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